UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. JOHN MARSHALL, Warden, Respondent.	Civil No. 07cv2183-DMS (RBB) **ORDER:** **(1) REQUIRING RESPONDENT TO FILE AN OPPOSITION TO PETITIONER'S REQUEST FOR STAY AND ABEYANCE; AND** **(2) DENYING PETITIONER'S MOTION FOR EXTENSION OF TIME TO FILE TRAVERSE [DOC. NO. 21]**

Petitioner James H. Cunningham, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on November 13, 2007 [doc. no. 1]. He also filed a Motion for Stay and Abeyance of Federal Habeas Corpus Petition to Exhaust Additional Unexhausted Claims in the State Courts [doc. no. 3], which District Judge Dana M. Sabraw denied without prejudice on November 27, 2007 [doc. no. 5]. On January 22, 2008, Petitioner submitted a renewed Motion for Stay and Abeyance of Federal Habeas Petition [doc. no. 12], which was filed nunc pro tunc to January 9, 2008. This Motion was denied without prejudice on February 21, 2008, because Cunningham did not identify the claims that he wanted to assert, instead stating only that there were "newly-discovered trial errors . . . ." (Order Denying Stay & Abeyance [doc. no. 15] 2.)

On February 25, 2008, Respondent filed an Answer to Petition for Writ of Habeas Corpus [doc. no. 16], with a Notice of Lodgment [doc. no. 17]. Petitioner subsequently submitted a First Amended Petition, which was filed nunc pro tunc to March 3, 2003, although the declaration of service indicates that it was served on February 20, 2008. The Amended Petition asserts six grounds for relief, while the original Petition asserted only four. Attached to the Amended Petition as Exhibit H is a third Request for Stay and Abeyance of Petitioner's Federal Habeas Petition to Exhaust Several Unexhausted Claims in State Court. (Am. Compl. Ex. H.) Petitioner has also filed a Motion [doc. no. 21] requesting an extension of time to file his traverse to the Answer.

I. REQUEST FOR STAY AND ABEYANCE

Cunningham states that grounds one, two, and three of the Amended Petition have not yet been exhausted in state court, but he recently filed a habeas petition in the California Supreme Court to exhaust them. (Id. at 1.) He requests that the Court hold his Amended Petition in abeyance and stay the present proceedings, pursuant to Rhines v. Weber, 544 U.S. 269 (2005), while he awaits a ruling from the state court. (Am. Compl. Ex. H at 1.) Petitioner asserts he is entitled to a stay and abeyance because he acted diligently in presenting these three claims, but he did not discover them previously because his appellate counsel was ineffective and because Cunningham has only an elementary-grade education and suffers from a mental health disorder. (Id. at 2.)

In Rhines v. Weber, 544 U.S. at 277, the Supreme Court held that district courts have limited discretion to hold in abeyance a mixed habeas petition, that is, one containing both exhausted and unexhausted claims, in order to permit a petitioner to return to state court to exhaust additional claims while the federal proceedings are stayed. The Rhines Court held that "a stay and abeyance 'should be available only in limited circumstances,' and is appropriate only when the district court determines that there was 'good cause' for the failure to exhaust." Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005) (quoting Rhines, 544 U.S. at 277). The court in Jackson noted that the Rhines holding applies to stays of mixed petitions but that Rhines did not comment on the validity of the withdraw and abeyance procedure approved of in Calderon v. United States District Court (Taylor), 134 F.3d 981 (9th Cir. 1998) and Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), where unexhausted claims are withdrawn from a mixed petition and the resultant fully-exhausted petition is held in abeyance while petitioner returns to state court to exhaust the unexhausted claims. Jackson, 425 F.3d at 661. Because Jackson involved a mixed petition, the Court held that Rhines directly controlled, and "left for another day the question of whether the stay standard announced by the Supreme Court in Rhines applies to our three-step stay-and-abeyance procedure." Id.

Irrespective of whether Petitioner's motion for stay is subject to the restrictions placed on this Court's discretion to issue a stay as set forth in Rhines, or is subject to the Ninth

Circuit's withdraw and abeyance procedure, Petitioner must satisfy the criteria for issuance of a stay. Under either procedure, he must demonstrate there are arguably meritorious claims which he wishes to return to state court to exhaust and that he is diligently pursuing his state court remedies with respect to those claims. Jackson, 425 F.3d at 661; Anthony v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000); Taylor, 134 F.3d at 987; see also Kelly, 315 F.3d at 1070. In his Amended Petition and Request for Stay and Abeyance, Petitioner has attempted to demonstrate that he has meritorious claims pending before the California Supreme Court.

Accordingly, the Court **ORDERS** Respondent to file a response to Cunningham's Request for a Stay and Abeyance no later than **April 21, 2008**. Respondent shall address whether a stay is appropriate in this case under the United States Supreme Court's decision in Rhines v. Weber, 544 U.S. 269 (2005). At the time the response is filed, Respondent shall lodge with the Court all records bearing on these issues. The lodgments shall be accompanied by a notice of lodgment which shall be captioned "**Notice of Lodgment in 28 U.S.C. § 2254 Habeas Corpus Case - To Be Sent to Clerk's Office**." Respondent shall not combine separate pleadings, orders, or other items into a combined lodgment entry. Each item shall be numbered separately and sequentially.

If Petitioner wishes to file a reply to Respondent's opposition, he shall do so no later than **May 19, 2008**. The reply shall not exceed ten (10) pages in length, including attachments and exhibits, absent good cause.

II. MOTION FOR EXTENSION OF TIME TO FILE TRAVERSE

In the Order Requiring Response to Petition [doc. no. 5] issued on November 27, 2007, Respondent was ordered to file its Answer no later than March 3, 2008, and Petitioner was ordered to file any traverse no later than March 31, 2008. (Order Requiring Response 4.) Respondent filed its Answer on February 25, 2008, addressing the claims raised in the original Petition. Cunningham now requests an extension of time to file a traverse in response to the Answer, stating that he has limited access to the law library and has not be able to complete the necessary legal research. (Mot. for Extension [doc. no. 21] 2.) Petitioner's request for an extension of time to file a traverse is **DENIED**. The March 31, 2008, deadline to file a traverse is vacated. The Court will issue a new scheduling order after it rules on Petitioner's Request for Stay and Abeyance of Petitioner's Federal Habeas Petition.

IT IS SO ORDERED.

DATED: March 21, 2008

Ruben B. Brooks
United States Magistrate Judge

cc: Judge Sabraw
All parties